

NOT FOR PUBLICATION – FOR UPLOAD

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

Galt Capital, LLP, and Bruce)	
Randolph Tizes,)	
)	
Plaintiffs,)	
)	
v.)	
)	
Edward A. Seykota and Peter Roizen,)	
)	
Defendants.)	
)	Civ. No. 2002-63
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Edward A. Seykota,)	
)	
Counterclaimant,)	
)	
v.)	
)	
Galt Capital, LLP, and Bruce)	
Randolph Tizes,)	
)	
Counterclaim)	
Defendants,)	
)	
and Sydney Stern,)	
)	
Additional)	
Counterclaim)	
Defendant.)	
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ATTORNEYS:

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St. Thomas, U.S.V.I.

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Frederick G. Watts, Esq.

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For defendant and counterclaimant Edward Seykota

Michael C. Dunston, Esq.
St. Thomas, U.S.V.I.
For defendant Peter Roizen

Karin A. Bentz, Esq.
St. Thomas, U.S.V.I.
For counterclaim defendant Sydney Stern

MEMORANDUM

Moore, J.

Defendant Edward A. Seykota has filed a motion to revise an admission he made on September 16, 2002, and an accompanying motion to amend his answer to the complaint. For the reasons stated below, I find that allowing Seykota to withdraw his admission and amend his answer at this late date is not warranted under the Federal Rules of Civil Procedure, as it would unduly prejudice the plaintiffs. Accordingly, I will deny the aforementioned motions. I will also deny the plaintiffs' related motion to deem the attorney-client and work-product privileges waived regarding certain communications Seykota had with his attorneys, as my denial of Seykota's motions prevents him from waiving these privileges by inserting these communications into this litigation.

I. FACTUAL BACKGROUND

The facts underlying this litigation have previously been reviewed in detail by this Court, thus only a brief summary is necessary here. See *Galt Capital, LLP v. Seykota*, 2004 WL 298400 (D.V.I. 2004). In late 2001, Seykota and Tizes, the two principal partners in Galt Capital, LLP, had a falling out which culminated in Seykota allegedly abandoning the partnership in breach of the partnership agreement. Following this development, Seykota and Tizes entered into a separation agreement that was intended to resolve all claims and disputes between them. After failing to negotiate the separation agreement directly with Tizes, Seykota hired attorney Sidney Machtinger to negotiate for him and conclude the separation agreement. The negotiation and conclusion of this separation agreement, however, is now the source of a dispute between the parties.

In litigating this dispute, Seykota answered the plaintiffs' first set of requests for admissions on September 16, 2002. Seykota now seeks permission to amend his response to the second request for admission and supplement it as follows:

Request for Admission No. 2: Do you admit that the document annexed hereto as Exhibit 2 is a true and correct copy of the Separation Agreement executed by you on or about February 20, 2002?

Answer: Admitted.

Proposed amended answer: The signature on page 5 of the Separation Agreement is that of Mr. Seykota. However further investigation reveals that the final signature page did not contain the handwritten notation "See Memo Galt & Tizes to Machtinger of 22 Feb 2002."

Thus, Seykota now claims that the true and correct copy of the final signature page of the separation agreement does not include a handwritten notation written by Tizes that refers to a February 22, 2002 memorandum from Tizes to Machtinger.

The parties present drastically different stories regarding whether the final version of the signature page contained a handwritten notation. Seykota admits that a version of the signature page included the notation, but that this was not the final version. Instead, Seykota claims that Tizes produced a final, non-notation version of the signature page on August 26, 2002. The plaintiffs, in contrast, state the newly discovered non-notation version of the signature page is a "fabrication" and that Seykota is attempting to "play fast and loose with this Court." (Pls.' Opp'n at 6.) For the reasons explained below, it is unnecessary to determine which party's story most closely resembles reality because it is too late in the litigation to permit Seykota to withdraw his original admission and replace it with a new one.

II. ANALYSIS

A. Permitting Seykota to Withdraw His Admission Would Cause Undue Prejudice To The Plaintiffs

The Third Circuit Court of Appeals has recognized that an admission of a party made pursuant to Rule 36 of the Federal Rules of Civil Procedure is binding for purposes of litigation, as it constitutes "an unassailable statement of fact that narrows the triable issues in the case." *Airco Industrial Gases, Inc. v. Teamsters Health & Welfare Pension Fund*, 850 F.2d 1028, 1037 (3d Cir. 1988). Rule 36, however, permits the withdrawal of an admission

when the presentation of the merits of the action will be subverted thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits.

FED. R. CIV. P. 36(b).

Applying the rule, I find that granting Seykota's motion to amend his admission would allow his "newly discovered" version of the separation agreement's signature page to be fully presented at trial. Assuming this would subserve the presentation of the merits of the action, it must be balanced against the prejudice such a late change in Seykota's admission of a material fact in the case would inflict on Galt Capital and Tizes. The prejudice contemplated under Rule 36(b) relates "to the difficulty a party

may face in proving its case because of the sudden need to obtain evidence required to prove the matter that had been admitted.'" *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 123 F.R.D. 97, 106 (D. Del. 1988) (quoting *Gutting v. Falstaff*, 710 F.2d 1309, 1314 (8th Cir. 1983)). I agree that the plaintiffs would be severely prejudiced if Seykota were allowed to withdraw his original admission and replace it with the amended version. For one thing, it raises the question of the authenticity of the referenced document and could require substantial additional discovery. Moreover, allowing Seykota to renege on his voluntary admission and now claim that the signature page referred to another document could require Galt Capital and Tizes to alter their litigation strategy after they justifiably relied on Seykota's September 16, 2002 admission.

Further tipping the balance in the plaintiffs' favor is Seykota's failure to explain why this "newly discovered" version of the signature page did not come to light earlier in the litigation. Seykota reports the new signature page was in the possession of his long-time personal attorney, Sidney Machtinger, but that Machtinger did not produce the document until April, 2004. Seykota, however, provides no explanation for his failure to retrieve the document from his former attorney before he made the September 16, 2002, judicial admission at issue. Seykota

cannot now use his apparent failure to complete due diligence with Machtinger as grounds for prejudicing the plaintiffs for their reliance on his admission. Accordingly, I will deny Seykota's motion to amend his Admission No. 2.

B. Justice Does Not Require That Seykota Amend His Answer

Seykota also seeks to amend his answer and affirmative defenses in response to the newly discovered non-notation version of the signature page. Rule 15(a) of the Federal Rules of Civil Procedure provides, in relevant part, that "a party may amend the party's pleading only by leave of court . . . and leave shall be freely given when justice so requires." Further, "[i]t is wholly within a district court's discretion to deny an amendment to the pleadings for delay and prejudice to the opposing party," and "a trial court can deny amendment when concerned with the costs that protracted litigation places on the courts." *Fort Howard Paper Co. v. Standard Havens, Inc.*, 901 F.2d 1373, 1379-80 (7th Cir. 1990).

For the reasons stated above, Seykota has failed to provide an adequate explanation why he did not previously discover the new version of the signature page, and allowing amendment of his answer at this late date would cause substantial prejudice to the plaintiffs. Moreover, allowing Seykota to amend his answer based on new information that he should have been able to discover several years ago would unnecessarily strain this Court's already

limited judicial resources. I therefore find that the interests of justice do not require that I allow Seykota to amend his answer, and I will exercise my discretion to deny his motion.

C. Plaintiffs' Motion To Deem Attorney-Client Privilege Waived Will Be Denied

On August 3, 2004, the plaintiffs filed a motion to deem the attorney-client and work-product privileges between Seykota and Machtinger waived regarding matters involving Seykota's motions to revise his admission and amend his answer. The plaintiffs' motion also requests that I deem the attorney-client and work product privileges waived between Seykota and his current counsel. The plaintiffs' argue that Seykota placed at issue in this litigation certain communications he had with his current and former counsel simply by filing his motions to revise his admission and amend his complaint.

Contrary to the plaintiffs' argument, Seykota's communications with his current and former attorneys regarding the non-notation signature page are not discoverable unless he is permitted to insert this signature page into this litigation. As I will not allow Seykota to insert the "newly discovered" signature page into this litigation by revising his September 16, 2002, admission or amending his answer, any dealings he had with his current or former counsel related to this signature page remain protected by the attorney-client and work-product

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privileges. I will therefore deny the plaintiffs' motion. An appropriate order follows.

ENTERED this 11th day of November, 2004.

For the Court

_____/s/_____
Thomas K. Moore
District Judge

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For defendant Peter Roizen

Karin A. Bentz, Esq.
St. Thomas, U.S.V.I.
For counterclaim defendant Sydney Stern

ORDER

Moore, J.

For the reasons stated in the accompanying memorandum of even date, it is hereby

ORDERED that defendant Edward A. Seykota's Motion To Withdraw Admission and his accompanying motion to amend his complaint are **denied**; it is further

ORDERED that the plaintiffs' August 3, 2004, motion to deem the attorney-client and work-product privileges waived between Seykota and his current and former counsel is **denied**.

ENTERED this 11th day of November, 2004.

For the Court

_____/s/_____
Thomas K. Moore
District Judge

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ATTEST:
WILFREDO MORALES
Clerk of the Court

By: _____
Deputy Clerk

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